

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
HARBOR FINANCIAL GROUP, INC.,	§	CASE NO. 99-37255-SAF-7
DEBTOR.	§	
	§	
JOHN H. LITZLER, CHAPTER 7	§	
TRUSTEE,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 01-3609
	§	
HOMEcomings FINANCIAL NETWORK,	§	
INC., et al.,	§	
DEFENDANTS.	§	

MEMORANDUM OPINION AND ORDER

In this adversary proceeding, John H. Litzler, the Chapter 7 trustee of the bankruptcy estate of Harbor Financial Group, Inc., et al., the debtors, seeks to avoid, under 11 U.S.C. §§ 544, 547, 548 and 550, transfers to Homecomings Financial Network, Inc. On August 9, 2002, Litzler filed a motion for summary judgment. On August 29, 2002, Homecomings filed its counter-motion for summary judgment. The court conducted a hearing on Litzler's motion on September 3, 2002, and then continued the hearing to be completed at the hearing on Homecomings' motion on September 24, 2002. At the hearing on September 24, 2002, Litzler voluntarily dismissed

all claims against Homecomings except those pertaining to the Geraldo Roman transfer.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus. Inc., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Id. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 323. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The court applies the same standards to the cross-motion for partial summary judgment.

Residential Funding Corporation purchased mortgage loans from New American Financial, Inc. (NAF), one of the Harbor debtors. Homecomings serviced the mortgage loans for Residential Funding. NAF transferred \$169,237.92 to Homecomings on August 10, 1999. NAF filed its bankruptcy petition on October 14, 1999. The transfer of \$169,237.92 pertained to mortgagor Geraldo Roman.

Litzler asserts that there is no genuine issue of material fact that the Roman transfer constitutes a fraudulent conveyance under § 548(a)(1)(B). On August 10, 1999, within one year of bankruptcy, NAF transferred \$169,237.92 to Homecomings. NAF and Homecomings had no contractual relationship. Homecomings did not provide value as defined under § 548(d)(2)(A) to NAF in exchange for the transfer. In his affidavit, Rob Caire, Homecomings' vice-president and manager of the investor accounting group, stated that the transfer was neither related to nor for the purpose of paying an antecedent debt of NAF to Homecomings. The parties do not dispute that NAF was insolvent at the time of the transfer. The trustee contends, therefore, that he is entitled to summary judgment avoiding the transfer under § 548(a)(1)(B).

However, Homecomings counter-moves that the transfer does not involve the transfer of an interest of the debtor, NAF, in property. Section 548 only applies to the "transfer of an interest of the debtor in property." 11 U.S.C. § 548(a)(1). The Caire affidavit with supporting documents suggests that the

transfer involved Roman's funds paid to satisfy his mortgage. That evidence includes the payoff of the mortgage, with a satisfaction of mortgage recorded with the Cook County, Illinois, Recorder on September 19, 1999.

On the other hand, Litzler presents summary judgment evidence that NAF transferred the funds from its bank account. The court presumes that the debtor has an interest in funds transferred from the debtor's bank account. In re Southmark Corp., 49 F.3d 1111, 1117 (5th Cir. 1995). Homecomings can rebut that presumption. Homecomings' summary judgment evidence suggests that the funds belonged to Roman, tendered for the payment of his mortgage, and did not belong to either NAF or Homecomings. Rather, NAF and Homecomings performed a servicing function. If NAF owned the mortgage, there is summary judgment evidence that NAF had transferred its ownership of the mortgage. Bergier v. I.R.S., 496 U.S. 53, 59 (1990); In re Maple Mortgage, 81 F.3d 592, 595 (5th Cir. 1996). This summary judgment record demonstrates a genuine issue of material fact concerning whether the transfer involved an interest of NAF in property.

Accordingly, the court will deny both Litzler's and Homecomings' motions regarding the trustee's avoidance claim under § 548 concerning the Roman transfer. There are no genuine issues of material fact that the transfer had been made within a year of the bankruptcy filing, that NAF made the transfer while

insolvent, and that NAF received no value, as defined in § 548(d)(2)(A), in exchange for the transfer. The sole issue for trial, therefore, is the question of whether NAF transferred an interest of the debtor in property. To the extent a fraudulent conveyance claim is pending under § 544, that also must go to trial for the same reason.

With regard to the trustee's claim under § 547(b) of the Bankruptcy Code, there is no genuine issue of material fact that the Roman transfer was not for or on account of an antecedent debt owed by NAF to Homecomings. Homecomings was not a creditor of NAF. 11 U.S.C. § 547(b)(1) and (2). Accordingly, Homecomings is entitled to a summary judgment dismissing Litzler claim under § 547(b).

The trustee argued, however, that NAF transferred the loan to Residential after Roman satisfied the mortgage. The trustee suggests that, as a result, Residential may have had a claim to the funds held by NAF from Roman. Apparently, the trustee argues therefore that the transfer to Homecomings may have been for the benefit of Residential. If so, and assuming Litzler can prove the other elements of § 547(b), the trustee may be able to request a judgment from Homecomings under 11 U.S.C. § 550. However, Litzler's complaint does not allege such a claim.

Based on the foregoing,

IT IS ORDERED that all claims by John H. Litzler under 11 U.S.C. §§ 544, 547, 548 and 550, against Homecomings Financial Network, Inc., except for the transfer of \$169,237.92 regarding Geraldo Roman, are **DISMISSED**.

IT IS FURTHER ORDERED that Litzler's motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART** and Homecomings' motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART**.

IT IS FURTHER ORDERED that Litzler's claim under 11 U.S.C. § 547 regarding the transfer of \$169,237.92 is **DISMISSED**.

IT IS FURTHER ORDERED that all elements of Litzler's claim under 11 U.S.C. § 548(a)(1) regarding the transfer of \$169,237.92 are established except for the requirement of the transfer of an interest of the debtor in property, and the issue of the transfer of an interest of the debtor in property shall be set for trial.

IT IS FURTHER ORDERED that this adversary proceeding is set for trial docket call on **November 4, 2002, at 1:30 p.m.**

Dated this _____ day of October, 2002.

Steven A. Felsenthal
United States Bankruptcy Judge